UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **DETIENNE ASSOCIATES LIMITED PARTNERSHIP**, Debtor.	Case No. **04-63115-11**

MEMORANDUM of DECISION

At Butte in said District this 29th day of July, 2005.

In this Chapter 11 bankruptcy case, after due notice, a hearing on confirmation of Debtor's Chapter 11 plan was held in Butte on June 7, 2005. Debtor was represented at the hearing by its counsel of record, James A. Patten; and Kevin DeTienne, the general partner of Debtor and the principle officer of Park Plaza Hotel, Inc., testified in support of confirmation. Debtor's Exhibits A-1 through A-9, B, C, D, E-1, E-2 and F were admitted into evidence without objection. Secured creditor Mountain West Bank was represented at the hearing by attorney Amy Randall. Objecting creditor Fremont Investment and Loan ("Fremont") was represented at the hearing by attorney Ross Richardson; and Pat Burt, a certified public accountant, testified on behalf of Fremont and in opposition to approval of Debtor's Chapter 11 plan. Fremont's Exhibit 1 was admitted into evidence without objection. At the conclusion of the hearing, the Court granted Debtor and Fremont until June 21, 2005, to file simultaneous briefs. Upon request of the parties, the briefing deadline was extended from June 21, 2005, to June 24, 2005. Both Debtor and Fremont filed post-hearing briefs on June 24, 2005. The matter is thus ready for decision.

This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law.

BACKGROUND

Debtor is a limited partnership that has been family owned since the early 1970's. Currently, Kevin DeTienne ("Kevin") serves as Debtor's general partner and Kevin's sibling serves as a limited partner. Debtor operates as a holding company and its primary asset is a 71 room hotel in downtown Helena, Montana that operates under a franchise agreement with Holiday Inn. The hotel, known as the Holiday Inn Helena Downtown, also has a restaurant, lounge, nightclub, swimming pool, jacuzzi, exercise room and a meeting/convention area.

Park Plaza Hotel, Inc. ("Park Plaza") oversees the day-to-day activities of the Holiday Inn Helena Downtown. Park Plaza is owned solely by Kevin. Kevin has managed the day-to-day operations of the hotel since 1992 and is currently the General Manager of the hotel and intends to remain in that capacity.

The hotel was constructed in 1971 and was purchased by Debtor in 1984. In 1998, Debtor began an extensive remodel of the hotel which included acquisition of the Holiday Inn franchise. Debtor obtained bids for the remodel project and accepted the bid of a contractor from out of state. The remodel project did not go as planned and Debtor incurred unanticipated expenses to rectify and fix construction defects, resulting in a one year delay of the remodel project and project overages of $790,000.00.[1]

Kevin testified that Debtor's financial problems were compounded during the end of the construction project when local area forest fires in 2000 put a damper on summer tourism. Also,

[1] As a result of the construction defects, Debtor obtained a judgment against Designtex Exterprises in the sum of $2,012,281.00, but Debtor does not believe it will be able to collect on the judgment.

between 2000 and 2004, 4 new hotels were built in the Helena area, increasing the supply of rooms in Debtor's market area by approximately 60 percent.

The financial strains caused by the remodel project, reduced tourism as a result of fires in 2000 and an increase in the supply of hotel rooms in the Helena area prompted Debtor to seek protection under Chapter 11 of the Bankruptcy Code on October 13, 2004. As admitted in Debtor's Amended Disclosure Statement, the "Debtor's finances . . . are intertwined with the operations of the Park Plaza Hotel. The Debtor's ability to fund the Chapter 11 Plan is dependent, in its entirety, in the ability of Park Plaza Hotel to make the rent payments due to the Debtor. Therefore, in order to understand and appreciate the Debtor's financial projections, it is necessary to understand and appreciate the operations of the Park Plaza Hotel."

Debtor's Amended Disclosure Statement sets forth several tables summarizing the financial performance of Park Plaza for 2001, 2002, 2003 and 2004. Debtor also provides a table setting forth Debtor's operating expenses for the same years. The foregoing tables include a rent expense for Park Plaza and rental income for Debtor. According to Kevin's testimony, Park Plaza has not paid rent to Debtor for some time, as is reflected in the fact that Park Plaza owes Debtor approximately $660,707.00 in past due rent. Also, the expenses for Park Plaza show a property tax expense of $63,763.00 in 2004, $63,798.00 in 2003, $63,798.00 in 2002 and $67,658.00 in 2001. The Court questions whether Park Plaza paid such taxes as Debtor provides for the payment of delinquent property taxes in the sum of $137,000.00.[2] At any rate, given the interrelatedness between Debtor and Park Plaza, the Court has reconfigured Debtor's tables to

[2] Exhibit A attached to Fremont's post-hearing brief reflects that Debtor may actually owe in excess of $185,000.00 for past due property taxes.

delete the transactions between Debtor and Park Plaza. In particular, the Court has removed rent expense and rental income. The Court has also excluded noncash items from its tables, such as depreciation and amortization since such items do not impact Debtor's cash flow. Finally, for purposes which will be discussed later, the Court has excluded interest expense from the following summary:

	2001	**2002**	**2003**	**2004**
Rooms Sold	18368	17591	16876	16322
Average Daily Rate	68.64	71.63	67.45	66.21
Percent Occupancy	71%	68%	65%	63%
Revenue Summary				
Rooms	1260741	1260094	1138229	1080720
Food	757709	562589	541667	496474
Beverage	515265	553555	521027	456306
Other Food & Beverage	202066	190467	206072	144227
Telephone	16798	10420	10623	6150
TOTAL REVENUE	**2752579**	**2577125**	**2417618**	**2183877**
Room Expense	40017	30224	29852	18521
Room - Payroll	309314	261905	252970	258009
F& B Cost of Sales	466164	453646	465254	432144
F & B - Payroll	584816	538441	474439	432999
DEPARTMENT EXPENSES	**1400311**	**1284216**	**1222515**	**1141673**
GROSS PROFIT	**1352268**	**1292909**	**1195103**	**1042204**
Other Income				
Interest Income - Debtor	62248	8921	12027	9004
TOTAL REVENUES	**1414516**	**1301830**	**1207130**	**1051208**
Other Expenses of Park Plaza				
General & Administrative	88768	136275	179326	197463
Marketing	105337	176175	81137	118738
Franchise Fees	138403	72313	116878	107755
Energy	131546	126409	141700	139046
Property Operations & Maintenance	278873	206801	95886	93894
Property Taxes	67658	63798	63798	63763
Insurance	26926	28772	35378	41415
Interest	120079	59693	41424	41439
Misc. Expense	15978	31558	74844	14033
Total other expenses of Park Plaza	**973568**	**901794**	**830371**	**817546**

Other Expenses of Debtor				
Accounting & Legal	8569	8350	2291	9038
Bank Charges	321	262	272	50
Consulting Expense	33000	40750	37345	36000
Life Insurance	6036	6036	6036	6036
Lease Expense	6981	7316	7030	1977
Misc. Expense	5054	69	16011	279
Total other expenses of Debtor	**59961**	**62783**	**68985**	**53380**
TOTAL OTHER EXPENSES	**1033529**	**964577**	**899356**	**870926**
NET INCOME	**380987**	**337253**	**307774**	**180282**

The foregoing net income should have been available to pay interest and principal on Debtor's and Park Plaza's obligations.

Debtor's proposed Chapter 11 plan sets forth 8 classes of creditors, all of which are impaired. Class I consists of real property taxes owing to Lewis & Clark County. Debtor proposes to pay the delinquent property taxes over a period of 6 years at an interest rate of 10% per annum. According to Fremont, Debtor owes in excess of $185,000.00 in delinquent property taxes. Class II consists of the debt owing to Fremont. Debtor proposes to pay the obligation over a period of 20 years at a rate of 6%. Fremont objects to the interest rate of 6% proposed by Debtors and asserts that such rate should include a risk factor. Fremont also asserts that it was owed $3,288,254.74 as of June 7, 2005, as opposed to the $2,923,302.58 listed by Debtor. Class III consists of the debt owed to Mountain West Bank. Debtor proposes to pay the obligation of $293,501.00 owing to Mountain West Bank over a period of 20 years at a rate of 6% interest. Class IV is comprised of the United States Small Business Administration ("SBA"). Debtor proposes to pay the SBA $312,576.00 over a period of 20 years at an interest rate of 4%. Class VI consists of American Casualty, CNA Insurance Company. American Casualty is owed

$118,000.00 and Debtor proposes to pay no interest to the Class VI creditor while the debt is amortized over a period of 20 years. Class VII consists of priority creditors. The creditors that comprise Class VII are Kevin, the Internal Revenue Service and the Montana Department of Revenue. The claims in Class VII will be paid over a period of 6 years at 0 percent interest. Finally, Class VIII consists of unsecured claims. Under the Plan, the unsecured class is to be paid over a term of 6 years. Debtor's plan does not contemplate the payment of any interest to the unsecured creditors.

The Chapter 11 Ballot Report entered June 6, 2005, shows the following:

Class	Creditor	Accepts	Rejects
II	Fremont Investment & Loan		$2,989,302.58 (as of 10/13/04) $3,288,254.74 (as of 6/7/05)
III	Mountain West Bank	$293,501.00	
IV	SBA	$312,576.00	
V	Rocky Mountain Bank		$544,959.00
NO CLASS OR AMOUNT			
	Daniels County	Accepts	

At the hearing, the parties stipulated that Rocky Mountain Bank is not a creditor of Debtor. Rather, Rocky Mountain Bank has a lien against the liquor license, inventory, accounts, furniture, fixtures, equipment and general intangibles of Park Plaza. Following the hearing on confirmation of Debtor's Chapter 11 plan, Park Plaza and Rocky Mountain Bank entered into a "Change in Terms Agreement" whereby Park Plaza agreed to make monthly payments of

$6,700.00 to Rocky Mountain Bank for a period of 120 months starting July 20, 2005, at an adjustable rate of interest that is presently 7.75%.

Fremont opposes approval of Debtor's Chapter 11 plan arguing that: (1) the plan violates the absolute priority rule set forth in 11 U.S.C. § 1129(b); (2) that Debtor's plan is not feasible; and (3) that Debtor's treatment of Fremont's claim is not fair, particularly as it relates to interest rate and the fact that Debtor has extended the payment term of the loan an additional 20 years beyond the original 5 year term. Debtor urges the Court to overrule Fremont's objections, arguing that its plan meets all the requirements of 11 U.S.C. § 1129, that the plan is fair and equitable as it relates to Fremont and that the plan will not be followed by liquidation or further reorganization. For the reasons discussed below, the Court finds that Fremont's objections are meritorious. As a result, confirmation of Debtor's Chapter 11 plan is denied, and this case is dismissed for cause.

DISCUSSION

All classes under Debtor's proposed Chapter 11 plan are impaired because their legal, equitable and contractual rights are altered by the Plan. *See In re Aceguia, Inc.*, 787 F.2d 1352, 1363 (9th Cir. 1986). However, at least two impaired classes voted affirmatively in favor of the Plan, thus satisfying 11 U.S.C. § 1129(a)(10). *In re Douglas Hereford Ranch, et al.*, 76 B.R. 781, 783 (Bankr. D. Mont. 1987). Having said thus, the Court will address the specific objections raised by Fremont.

I. **Fair and Equitable – § 1129(b)(2)(A)(i).**

As noted above, Fairmont objects that Debtor's proposed Chapter 11 Plan is not fair and equitable under 11 U.S.C. § 1129(b)(2)(A)(i) because the proposed interest rate of 6% is too low

and the 20 year period is too long, particularly in light of the fact that the original term of the loan was 5 years, which original loan period is scheduled to expire later this year. Payments on the foregoing obligation, along with payments on all other obligations set forth in Classes I through VIII, are scheduled to commence 60 days after confirmation.

A secured creditor's treatment under a plan will be classified as fair and equitable if the proposed plan provides the following with respect to secured claims:

> (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
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> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property.

11 U.S.C. § 1129(b)(2)(A)(i); *In re Boulders on the River*, 164 B.R. 99, 105 (9th Cir. BAP 1994).

Debtor's Chapter 11 plan provides on page 7 under Article VIII that "secured creditors and holders of security interests shall retain any security interest or other interest in the Debtor's property in accordance with the provisions of Article IV until their claims have been satisfied . . . ." The Court thus finds that the first prong of § 1129(b)(2)(A)(i) has been satisfied. *Id.*

The interest rate is more problematic. Fremont objects that it is too low at 6% per annum and the term is too long. The BAP in *Boulders on the River*, 164 B.R. at 105, noted that the Ninth Circuit applies the "formula rate" approach for determining the interest payable on the deferred payment of an obligation under the cramdown. *See also In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990); *In re Camino Real*, 818 F.2d 1503, 1508 (9th Cir. 1987); *Tax Collector v.*

Pluma (In re Pluma), 303 BR 444, 447-48 (9th Cir. BAP 2003) (Chapter 13).

In *In re Janssen Charolais Ranch, Inc.*, 4 Mont. B.R. 290, 73 B.R. 125, 127-28 (Bankr. D. Mont. 1987), this Court discussed the requirements of 11 U.S.C. § 1225(a)(5)(B)(ii), which are similar to the requirements of 11 U.S.C. § 1129(b)(2)(A)(i)(II), in determining an appropriate interest rate:

> The issue in this case is whether the Bank is receiving under the Plan the value of the property, i.e., cash payments, distributed under the Plan which have a present value equal to the amount of its claim. Section 1225(a)(5)(B)(ii) is identical to 1325(a)(5)(B)(ii). *In re Trent*, 42 B.R. 279, 281 (Bankr.W.D.Va.1984) holds:
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> > "11 U.S.C. § 1325(a)(5)(B)(ii) requires that a plan providing for an allowed secured claim must propose to distribute property thereunder on account of such claim in an amount the present value of which is not less than the allowed amount of such claim. This requires a determination of the time value of money to be paid in the future under the plan. More is required than that the sum of all payments made on account of a secured claim equal the allowed amount of that claim. Future payments to be made under the plan must be discounted to determine their 'present value' and the total of the present values of all payments made on account of a secured claim provided for under the plan must at least equal the allowed amount of that claim."
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> The discount rate is equivalent to the rate of interest that would be paid on an obligation of the Debtor considering a market rate of interest that reflects the risk of the Debtor's business. However, the discount rate is used to compute a factor that reduces money that will be paid in the future to a sum of money with a present value. If that sum earns interest at a rate equal to the discount rate, then the result of the future will equal the original amount of money before discounting. The matter of proper interest or discount rate is addressed in *In re Welco Industries*, 60 B.R. 880, 882, 883 (9th Cir. BAP 1986) where the court held:
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> > "The factors relevant in determining an appropriate interest rate are discussed in 5 Collier on Bankruptcy, ¶ 1129.03, at 1129-65 (15th Ed. 1982):
> >
> > > 'The appropriate discount [interest] rate must be determined on the basis of the rate of interest which is reasonable in light of the risks

> involved. Thus, in determining the discount rate [interest] rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.'
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> * * *
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> The appropriate interest rate is the prevailing market rate for the type and quality of loan. Current market conditions determine what the market rate will be. One factor that has an impact on that determination is the prime rate. Prime represents the rate charged by commercial banks to prime commercial loan customers. [*In re] Mitchell*, [39 B.R. 696] at 701 [Bankr.Or. (1984)]. Factors which influence the determination of prime are the general level of money rates, the availability of reserves, general business conditions, size and term of loan, geographic variations, elements of profits and collection costs."

To the same effect is *U.S. v. Neal Pharmacal Co.*, 789 F.2d 1283 (8th Cir.1986) and *In re Martin*, 66 B.R. 921, 927 (Bankr.Mont.1986).

In the present case, the Debtor has failed to show that the proper discount or interest rate should be the rate of 8%. It appears that interest figure was merely pulled out of the hat and bears no resemblance to market interest rates required under *Welco*.

More recently, this Court discussed interest rates in the context of present value in *In re Schaak*, 17 Mont. B.R. 349, 355-56 (Bankr. D.Mont. 1999), quoting *In re Brummer*, 12 Mont. B.R. 219, 223-24 (Bankr. D. Mont. 1993) (*quoting In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990)). There, the Court explained two methods by which a cramdown interest rate may be determined, either by taking testimony on current market interest rates for similar loans in the region, or by use of a formula starting with a base rate and adding a factor based on the risk of default and the nature of the security. *Id.* The Ninth Circuit approved the formula approach in *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F.2d 1503, 1508 (9th Cir. 1987); *In re Fowler*, 903 F.2d at 697-98; *In re Boulders on the River, Inc.*, 164 B.R. 99, 105 (9th Cir.

BAP 1994).

The analysis of cramdown interest rates in a Chapter 12 also applies in a Chapter 11 cramdown context. *In re Fowler*, 903 F.2d at 697-98; *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F.2d 1503, 1504 n.1 (9th Cir. 1987). Under the formula rate approach the court starts with a base rate and adds a risk factor based on the risk of default and the nature of the security. *Boulders on the River*, 164 B.R. at 105; *In re Fowler*, 903 F.2d at 697; *In re Pluma*, 303 BR at 448; *see also Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 1961-62, 158 L.Ed.2d 787 (2004) (Chapter 13 cramdown – after hearing, adjust prime rate to account for the greater nonpayment risk that bankrupt debtors typically pose, depending on such factors as the circumstances of the estate, the nature of security, and the duration and feasibility of the reorganization). The interest rate determination is to be made on a case-by-case basis. *Boulders on the River*, 164 B.R. at 105; *In re Camino Real*, 818 F.2d at 1508; *In re Pluma*, 303 BR at 447.

Debtor agreed at the hearing that the prime rate of interest is the appropriate starting point for determining whether an interest rate is fair and equitable. Kevin offered the naked assertion that prime plus a risk factor of ¼% is appropriate under the circumstances and thus agreed that the interest rate in this case should be 6.25% rather than the 6% listed in Debtor's proposed Chapter 11 plan.[3]

Pat Burt, the CPA called to testify by Fremont, testified that he typically sees interest

[3] The prime rate of interest on the date of the confirmation hearing was 6%. The prime rate of interest was 5.75% when Debtor filed its proposed plan. Effective June 30, 2005, the prime rate was increased to 6.25% and thus, the rate of interest proposed by Debtor would now be 6.5%.

rates anywhere from 1.5% to 2% above prime for clients that are not in bankruptcy. With regard to assessing the risk in the instant case, Mr. Burt explained that he would want to see a complete set of financial statements for both Debtor and Park Plaza and would want to see completed tax returns for both entities. Debtor has not provided the Court or parties in interest with complete financial statements, such as an income statement and balance sheet, nor has Debtor provided complete tax returns, for either Debtor or Park Plaza. Mr. Burt noted that historically, Debtor has been seeing decreasing revenues since 2001 and Mr. Burt saw nothing concrete showing how Debtor would increase revenues.

After considering evidence, testimony, the risk of default and the nature of the security as required by *Boulders on the River*, 164 B.R. at 105, the Court finds that Debtor has not satisfied its burden of proof under 1129(b)(2)(A)(i)(II). Specifically, Debtor has not shown that the 6.25% interest rate it proposes to pay Fremont is fair and equitable.

The Court would note that it is Debtor's burden, and not Fremont's or the Court's, to show it has satisfied all the confirmation requirements of § 1129(b). *Soo*, 15 Mont. B.R. at 162. The lack of expert testimony or any other evidence, other than the opinion of Kevin, in support of Debtor's cramdown interest rate works against Debtor, and means it has failed to demonstrate that its proposed interest rate is "fair and equitable" as required by 11 U.S.C. § 1129(b)(2)(A)(i)(II).[4]

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[4] The Court appreciates the U. S. Supreme Court's plurality decision in *Till v. SCS Credit Corp.*, 541 U.S. 465, 484-85, 124 S.Ct. 1951, 1964 (2004) (a Chapter 13 case), and the statement made by Justice Stevens:

> Justice SCALIA identifies four "relevant factors bearing on risk premium[:] (1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative

Given Debtor's failure to sustain its burden and based upon the testimony of Mr. Burt, the Court finds that the appropriate interest rate in this case is at least 8.%. Indeed, the agreement between Park Plaza and Rocky Mountain Bank dated June 22, 2005, provides for an adjustable rate of interest that is currently 7.75%.

With regard to term, Debtor offered absolutely no evidence to support its proposed

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> expenses of enforcement." *Post*, at 1973. In our view, any information debtors have about any of these factors is likely to be included in their bankruptcy filings, while the remaining information will be far more accessible to creditors (who must collect information about their lending markets to remain competitive) than to individual debtors (whose only experience with those markets might be the single loan at issue in the case). Thus, the formula approach, which begins with a concededly low estimate of the appropriate interest rate and requires the creditor to present evidence supporting a higher rate, places the evidentiary burden on the more knowledgeable party, thereby facilitating more accurate calculation of the appropriate interest rate.
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> If the rather sketchy data uncovered by the dissent support an argument that Chapter 13 of the Bankruptcy Code should mandate application of the presumptive contract rate approach (rather than merely an argument that bankruptcy judges should exercise greater caution before approving debt adjustment plans), those data should be forwarded to Congress. We are not persuaded, however, that the data undermine our interpretation of the statutory scheme Congress has enacted.

Till, 541 U.S. at 484-85, 124 S.Ct. 1964-65. Because *Till* involves a 4-4-1 decision by the Justices, and given the lack of consensus on a legal rationale by the Justices, this Court concludes that *Till* produces no majority rule of law and results in no binding precedent. "[A]n affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases either in [the Supreme Court] or in inferior courts." *In re Cook*, 322 B.R. 336, 343 (Bankr. N.D. Ohio 2005), *citing Hertz v. Woodman*, 218 U.S. 205, 213-14, 30 S.Ct. 621, 54 L.Ed. 1001 (1910). Consequently given the burden of proof established in the 9th Circuit Court of Appeals in *Ambanc*, 115 F.3d at 653, the debtor must satisfy the requirements for confirmation. However, the creditor may always provide evidence to refute the debtor's proof and to support a higher risk premium. As noted above, the formula approach has been used in this District since the late 1980's.

repayment term of 20 years. As discussed by this Court in *In re Crown Oil*, 16 Mont. B.R. 534, 539-40 (Bankr. D. Mont. 1998):

> This Court must consider the entire plan in the context of the rights of the objecting creditors and the particular facts and circumstances of the Debtor's financial plight in determining whether the plan is fair and equitable under § 1129(b)(2). *Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank (Matter of Sandy Ridge Dev. Corp.)*, 881 F.2d 1346, 1352 (5th Cir. 1989) ("[T]echnical compliance with the requirements of section 1129(b)(2) does not assure that the plan is fair and equitable. Instead, this section merely sets minimal standards..."); *Federal Savings & Loan Ins. Corp. v. D & F Construction Inc. (Matter of D & F Const. Inc.)*, 865 F.2d 673 (5th Cir. 1989); *In re Montgomery Court Apartments of Ingham County, Ltd.*, 141 B.R. 324, 346 (Bank. S.D.Ohio 1992). In general, the courts have stated a plan is not fair and equitable with respect to a secured lender when the plan unduly shifts the risks of a successful reorganization to those creditors:
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> > [T]he [terms of the plan] should not leave the lender so bare of protection as to greatly increase the risk or require a corresponding increase in the interest rate.
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> *In re P.J. Keating Co.*, 168 B.R. 464, 473 (Bankr. Mass. 1994). *See also, Aetna Realty Investors, Inc. v. Monarch Beach Venture, Ltd. (In re Monarch Beach Venture, Ltd.)*, 166 B.R. 428, 436 (D. C.D.Cal. 1993). Other courts have suggested that a plan is not fair and equitable if the debtor is essentially speculating with the lender's interest in the assets. *In re Manion*, 127 B.R. 887, 890 (Bankr. N.D.Fla. 1991).

In the instant case, Debtor is certainly speculating with Fremont's interest in Debtor's real property. The original term of the obligation between Debtor and Fremont was 5 years. Debtor proposes to extend that period almost four-fold. Such increase in term smacks of inequity. Moreover, Park Plaza's June 22, 2005, agreement with Rocky Mountain Bank provides for a repayment term of 10 years. The Court would thus conclude that a fair and equitable term in the instant case would be closer to 10 years, as opposed to 20 years proposed by Debtor.

II. Feasibility - 11 U.S.C. § 1129(a)(11).

Section 1129(a)(11) sets forth the requirement that: "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Matter of Pizza of Hawaii*, *Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985), *quoting*, 5 *Collier on Bankruptcy*, ¶ 1129-34 (15th ed. 1984); *In re Schaak,* 17 Mont. B.R. at 357. As explained in *In re Martin*, 66 B.R. at 925-926:

> The Plan must be feasible, that is, confirmation of the Plan under Section 1129(a)(11) is not likely to be followed by liquidation or the need for further reorganization of the Debtors. *In Re Prudential Energy, supra*, holds at 862-63:
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> > "Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under 1129(a)(11). Most Debtors emerge from reorganization with a significant handicap. But a plan based on impractical or visionary expectations cannot be confirmed. (Citing cases and authority). All that is required is that there be a reasonable assurance of commercial viability. *In Re Trail's End Lodge*, 54 B.R. [898] at 904 [Bankr.Vt.1985]."
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> Further, *In Re Clarkston*, 767 F.2d 417, 420 (8th Cir.1985), states:
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> > " * * * The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts. *In Re Bergman*, 585 F.2d 1171, 1179 (2nd Cir.1978) (quoting 9 COLLIER ON BANKRUPTCY at 1139). Pertinent factors to be considered include the business's earning power, the sufficiency of the capital structure, economic conditions, managerial efficiency, and whether the same management will continue to operate the company. *In Re Great Northern Protective Services, Inc.*, 19 B.R. 802, 803 (Bankr.W.D.Wash.1982)."

Id. at 925-26.

As noted earlier, the history of Debtor's and Park Plaza's business shows that in the year

2001, the income from the hotel was $380,987, before depreciation or payments on any long-term obligations. The revenues have steadily decreased since 2001, dropping to $337,253.00 in 2002, $307,774.00 in 2003 and $$180,282.00 in 2004. During this same period, real property taxes, as well as mortgage payments, were in or went into default in substantial amounts.

Despite the foregoing historical figures, Debtor has painted a rosy picture for the Plan in the years 2005 through 2010. In particular, Debtor's projections, using the same format as utilized by the Court on pages 4 and 5 of this Memorandum of Decision results in the following:

	2005	2006	2007	2008	2009	2010
Rooms	1158000	1176523	1135875	1158770	1178654	1169975
Food	506403	516531	526862	527915	538474	539551
Beverage	465432	474740	484235	485204	494908	495898
Other Food & Beverage	147112	150054	153055	153361	156429	156742
Telephone	6273	6398	6526	6539	6670	6683
TOTAL REVENUE	**2283220**	**2324246**	**2306553**	**2331789**	**2375135**	**2368849**
Room Expense	18891	19269	19654	19694	20087	20128
Room - Payroll	263169	268433	273801	274349	279836	280395
F& B Cost of Sales	388734	396509	404439	405248	413353	414179
F & B - Payroll	441659	450492	459502	460421	469629	470568
DEPARTMENT EXPENSES	**1112453**	**1134703**	**1157396**	**1159712**	**1182905**	**1185270**
GROSS PROFIT	**1170767**	**1189543**	**1149157**	**1172077**	**1192230**	**1183579**
Other Income						
Interest Income	0	0	0	0	0	0
REVENUES	**1170767**	**1189543**	**1149157**	**1172077**	**1192230**	**1183579**
Other Expenses of Park Plaza						
General & Administrative	116444	118537	117634	118921	121132	120811
Marketing	121112	122323	124770	125019	127520	127775
Franchise Fees	115800	117652	113588	115877	117865	116998
Energy	141827	143245	146110	146403	149331	149629
Property Operations &	95772	96730	98664	98861	100839	101040
Maintenance						
Property Taxes	65038	65688	67002	67136	68479	68616
Insurance	42244	42666	43519	43606	44479	44567
Interest						
Misc. Expense	14314	14457	14746	14776	15071	15101

Total other expenses of Park Plaza	**712551**	**721298**	**726033**	**730599**	**744716**	**744537**
Other Expenses of Debtor						
Accounting & Legal	5000	5000	5000	5000	5000	5000
Bank Charges	100	125	150	175	200	225
Consulting Expense	0	0	0	0	0	0
Life Insurance	0	0	0	0	0	0
Lease Expense	0	0	0	0	0	0
Misc. Expense	200	200	200	200	200	200
Total other expenses of Debtor	**5300**	**5325**	**5350**	**5375**	**5400**	**5425**
TOTAL OTHER EXPENSES	**717851**	**726623**	**731383**	**735974**	**750116**	**749962**
NET INCOME	**452916**	**462920**	**417774**	**436103**	**442114**	**433617**

Debtor's above projections, which do not include any payments on long-term obligations, depreciation or amortization, far exceed Debtor's and Park Plaza's historical performance between 2001 and 2004, where the highest revenue generated at the hotel was $380,987.00. As Mr. Burt aptly noted, Debtor has not provided any evidence to show that Debtor can experience revenues that Debtor and Park Plaza have not achieved historically. Nevertheless, solely for purposes of argument, the Court will accept Debtor's lofty revenue projections and show that Debtor's proposed plan does not pass muster, even using Debtor's inflated revenue projections.

Again, assuming for purposes of discussion that Debtor could indeed realize the above income, the Court would first subtract the obligation owing by Park Plaza to Rocky Mountain Bank. The monthly payment on that obligation is $6,700.00 commencing July 20, 2005.

	2005	2006	2007	2008	2009	2010
NET INCOME	**452916**	**462920**	**417774**	**436103**	**442114**	**433617**
Rocky Mountain Bank	40200	80400	80400	80400	80400	80400
Cash Available for Plan	412716	382520	337374	355703	361714	353217

Debtor thus has the above cash with which to make the payments proposed under the

plan. Debtor did not dispute Fremont's assertion that Debtor owes approximately $185,000.00 in delinquent property taxes. The Court has thus reamortized that obligation to reflect a monthly payment of $3,428.00. The Court has also recalculated the monthly payment to Fremont assuming an obligation of $3,288,254.00 paid over a period of 10 years at a rate of 8% interest. Utilizing the above figures, the monthly payments on Fremont's obligation would be approximately $39,895.00. The other monthly payments are as set forth on page 38 of Debtor's Amended Disclosure Statement. The following table reflects Debtor's and Park Plaza's combined cash position, assuming Debtor began making payments on the above obligations starting in September of 2005:

	2005	2006	2007	2008	2009	2010
Cash Available for Plan	412716	382520	337374	355703	361714	353217
Lewis & Clark	13712	41136	41136	41136	41136	41136
Fremont	159580	478740	478740	478740	478740	478740
Mountain West	8412	25236	25236	25236	25236	25236
US Bank (SBA)	7576	22728	22728	22728	22728	22728
American Casualty	3276	9828	9828	9828	9828	9828
Priority	1216	3648	3648	3648	3648	3648
General Unsecured	5280	15840	15840	15840	15840	15840
Net Cash Flow	253864	(134236)	(179382)	(161053)	(155042)	(163539)

The Court's above illustration demonstrates that Debtor's proposed plan squeaks by in 2005 simply because Debtor only has to make payments for 4 months, after enjoying 8 months of revenue. However, in 2006, Debtor's proposed plan fails miserably when Debtor has to make plan payments for a full year. In sum, the Court concludes that Debtor's plan is nothing more than a visionary scheme, based on questionable financial data, that prolongs the inevitable.

Debtor and Park Plaza simply do not have the means to service their debt load, in any fashion, under Chapter 11 of the Bankruptcy Code. Debtor has failed its burden of showing that confirmation of its proposed plan will not likely be followed by the liquidation or the need for further financial reorganization.

Given the Court's above findings regarding feasibility and whether Debtor's plan is fair and equitable, the Court need not discuss Fremont's absolute priority objection. Suffice it to say, the Court is left to decide whether to dismiss this case or to allow Debtor an opportunity to amend its plan. Denial of confirmation of a proposed plan may be cause for dismissal pursuant to 11 U.S.C. § 1112(b)(5) if the court denies a request for additional time to modify or file another plan. The record in the case *sub judice* supports a finding of cause for dismissal due to Debtor's complete failure to present any concrete evidence in support of its interest rate treatment of Fremont or the term; the fact that Debtor offered so little evidence in support of its Plan, including Debtor's failure to provide financial statements and tax returns; and Debtor's failure to demonstrate that it can achieve in the future what is was unable to achieve in the past.

IT IS THEREFORE ORDERED that the Court will enter a separate order denying confirmation of Debtor's Chapter 11 Plan; and dismissing this case for cause.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana